NO. 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

DORSEY K. OFFUTT, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

REPLY BRIEF FOR PETITIONER.

WARREN E. MAGEE,
745 Shoreham Building,
Washington 5, D. C.

CHARLOTTE MASKEY,
745 Washington Building,
Washington 5, D. C.
Attorneys for Petitioner.

Of Counsel:
MAGEE, BULOW & ANDERSEN,
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

TABLE OF CASES.

MISCELLANEOUS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 27

DORSEY K. OFFUTT, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

REPLY BRIEF FOR PETITIONER.

Petitioner contends that the serious constitutional questions presented in his Brief required a more open and candid treatment than that afforded in respondent's Brief. A reply is deemed essential to a proper presentation to this Honorable Court of the grave issues involved and upon which the independence of the Bar and the freedom and reputation of petitioner, a respected member of the Bar, depend.

REPLY TO RESPONDENT'S QUESTIONS PRESENTED.

Respondent under "Questions Presented" reverses their proper order and under question 1 deals first with whether the incidents upon which the trial judge relied were contempt of court. In other words, respondent deals with the merits first and then discusses the jurisdictional constitutional question involved. We submit that the jurisdictional question, *i.e.*, whether as a part of the due process of law a biased and prejudiced judge can impose against an attorney a summary sentence of contempt is the first question to be resolved in this case. We think that the restating of the questions presented in respondent's Brief and the intermingling of jurisdictional questions with the merits are not helpful, are confusing and require a full discussion by us of the events relied upon by respondent *in context* if justice is to be done petitioner. For the convenience of the Court we will answer respondent's Brief in its order of presentation.

REPLY TO RESPONDENT'S STATEMENT.

A. This section of respondent's Brief (Br. 4-6) restates a few of the facts which are stated in detail in our Brief (pp. 8-11). It points out just as we have pointed out that Judge Holtzoff at the conclusion of the trial but before the jury's verdict summarily sentenced petitioner for contempt and enumerated twelve main specifications in support of this sentence.

Respondent then states (Br. 5-6) that the trial was punctuated by numberless incidents on the part of petitioner which led him to be continuously admonished and reproved by the judge. We respectfully request that each citation on page 6 of respondent's Brief be read in context. This reading will show that in every cited incident petitioner interposed his objections or made his motions respectfully. In some of the incidents he sought the right to approach the bench before asking questions in order that he would not offend against any previous ruling of the

judge (R. 224). When such a request was denied and petitioner was instructed to proceed (R. 224-225), petitioner followed the judge's instructions and put his questions to the witness. On many of the cited occasions the judge acted in an excitable and angry manner, interposed objections *sua sponte* and arbitrarily refused proffers of proof (R. 226-228). In making many of his rulings the judge raised his voice unnecessarily, engaged in prejudicial personal gestures and used unrestrained and abusive language against petitioner. In each instance where petitioner attempted to have the record reflect personal mannerisms of the judge, the judge considered the *making* of the objections as insolent or stupid and even accused petitioner of losing his mind (R. 226). We respectfully ask that this Court compare the courteous and restrained conduct of the petitioner and his words with the conduct and words of the judge in every instance relied upon by respondent (Br. 6).

Respondent states (Br. 6) that petitioner was given repeated warnings that his conduct was inviting punishment for contempt and cites R. 81, 88, 142 and 180. As respondent deems these instances important, we will discuss them as they occurred.

At R. 81 petitioner was examining the mother of the prosecutrix out of turn. During the course of this examination he noticed that the judge raised his hand and leaned forward and looked at the prosecutor, thereby indicating to petitioner that the judge was signaling to the prosecutor that he interpose an objection (R. 81). When this occurred and the prosecutor objected without stating any grounds for his objection, the judge immediately sustained the objection. In order that the record might show this conduct on the part of the judge, petitioner made the following objection:

> Mr. Offutt: If Your Honor please, I object to Your Honor raising your hand and leaning forward and looking at the District Attorney before he makes an objection.

immediately summoned petitioner to the bench
n he considered the making of this objection
" and warned him that if he persisted he
d petitioner to jail for contempt (R. 81). In
ere might be no dispute in the record as to
statement contained in petitioner's objection to
conduct, petitioner respectfully addressed this
he judge:

Your Honor do that?

trying the charge or clarifying the factual
titioner had made for the record, the judge

ave no right to address questions to the court.
kindness to you I am warning you that if you
in your unethical and discourteous conduct,
end you to jail at the end of the trial. I shall
you. I shall send you to jail.

petitioner in a courteous manner informed the
meant no discourtesy but that he was describ-
culations of the judge in the record in accord-
decision of Judge Stephens of our Court of
this instance petitioner obviously was refer-
v. United States, 188 F. 2d 24; *Billeci* v.
s, 184 F. 2d 394 and *Vinci* v. *United States*,
7, which cases uphold the right of counsel in
of Columbia to state in the record this par-
judge's personal mannerisms when counsel
mannerisms prejudicial. This instance illus-
ntention that the judge here was very sensitive
tions to his personal conduct and in every in-
is record where such an objection is made for
the judge did not question the accuracy of the
nents involved in the objection or motion for a
treated the making of the objection or motion
and contemptuous. Petitioner's conduct in
ions is neither insolent nor contemptuous and

is in accordance with the rights of defense counsel as they are defined in the *Butler*, *Billeci* and *Vinci* cases.

At R. 88 petitioner objected to the prosecutrix, who was sitting in the front row of the court, signaling to her mother, who was being examined by petitioner, by the nodding of her head to her mother. We submit that a criminal trial would be a farce if the prosecuting witness is to be permitted to sit in the front row of the court and signal answers to a witness on the stand. When that situation occurs, as it did in the trial below, it was the duty of petitioner to bring that situation to the attention of the judge, which he did. Instead of the judge admonishing the prosecutrix and instructing her not to signal answers to her mother, the judge rebuked petitioner and accused him of causing a commotion and instructed him to behave himself. When petitioner specifically asked the judge to instruct the witness not to indicate by the nodding of her head or the shaking of her head an answer to the witness on the stand, the judge ignored this proper request and accused petitioner of being guilty of a serious breach of decorum and reminded petititoner of the "admonition" made at the bench and instructed him to proceed. The admonition obviously referred to was that at R. 81 where the judge threatened to send petitioner to jail at the end of the trial. Because neither the judge nor the prosecutor questioned the factual statements contained in petitioner's objection and in his request for admonitions to the prosecuting witness, the record is made and shows a situation where petitioner would have been derelict in his duty as defense counsel in a criminal case if he did not call the situation to the attention of the court. We see no contempt in this situation but rather the performance by petitioner of his duties as an advocate.

In order to understand the situatiton at R. 142, the record should be read from R. 138. Petitioner was cross-examining the witness Christianson, a felon, the paramour of the prosecuting witness Ott and the person responsible

for one of her alleged pregnancies. At R. 139 petitioner asked of this felon the following question:

> Q. Were you or were you not promised that a charge against you would be dismissed if you would sign a statement and help them to convict Dr. Peckham in this case?

The judge called counsel to the bench and in a threatening manner demanded of petitioner:

> What basis have you for asking that question?

This question of the judge was made in such a loud tone that petitioner believed the jury heard it. Accordingly, petitioner objected to the loud tone used by the judge and to threats by the judge intended to intimidate petitioner in his defense of Dr. Peckham. Again, as in prior instances, the judge did not question the accuracy of petitioner's objections, but treated the making of these objections against the tone of the judge's voice and his threats as discourtesy (R. 139). Petitioner politely and courteously informed the judge that he believed it was his duty to object when he felt that the judge's voice an attitude were prejudicing his client's defense (R. 140). The judge then insisted upon an answer to his question and for the basis for petitioner asking the witness whether he had received any promise that a charge against him would be dismissed if he would assist in the prosecution of Dr. Peckham (R. 140). When petitioner stated that a pending indictment against Christianson had been dismissed on January 30th, the judge admitted that petitioner had the right to ask the question. During the course of this discussion, petitioner pointed out to the judge that the case he was trying was a difficult one (R. 141), that he wished to make a motion without interruption and without statements being made in the hearing of the jury, such as the one which the judge had made earlier that the petitioner was

"stupid," and because of such statements petitioner wanted to make a motion for a mistrial. However, before petitioner could fully state the grounds of this motion, the judge interrupted him, denied the motion and again threatened petitioner with serious punishment (R. 142). When petitioner asked what misconduct he was guilty of, the judge refused to answer and ordered him back to the counsel table. We submit that petitioner's conduct during this incident was neither insolent nor contemptuous and did not justify jail or other threats by the judge.

The details of the incidents next referred to by respondent (Br. 6) are set forth in the Appendix to respondent's Brief and will be discussed later.

B. Respondent states (Br. 6-7) that the Court of Appeals affirmed four of the twelve categories of misconduct but found that the record did not support the penalty imposed. In footnote 2 (Br. 6) respondent argues we are incorrect when we state that eight of the contempt findings were reversed. We think a reading of the two opinions below (R. 264; 269) will support our contention that only four of the findings were affirmed and the remaining eight necessarily were reversed. Actually we feel that the Solicitor General agrees with our contention in this regard as his Brief sets out (Br. 9-10) and discusses only the four charges which were affirmed below.

C. Respondent next discusses the details concerning petitioner's alleged contempt. After quoting verbatim specifications 1, 2, 6 and 12 from the judge's certificate (Br. 9-10), respondent states that a sharp conflict exists between respondent and petitioner as to who initially provoked the altercations in the trial court. Respondent states a resolution of this conflict requires consideration of the "entire record" as incorporated by reference in the judge's findings (Br. 11). In addition to the references cited by the judge, respondent desires this Court to search the "entire record" for additional citations which will tend to sustain

the judge's findings of contempt. The appeal in this case has been pending for almost two and one-half years. Respondent had full opportunity to include in the Joint Appendix filed in the case below all relative material which supported the contempt sentence. In such circumstances we do not think it is the duty of this Court to now make a search of the entire record in the *Peckham* case in an effort to find some support for belated arguments now appearing in respondent's Brief. While reading of the record will support our contention that petitioner is not guilty of contempt, we shall confine our Reply Brief to the record as relied upon by the judge and to those portions of the record which respondent relies upon in its Brief. Before discussing the four specifications of the judge which were affirmed below, we again invite the attention of this Court to the fact that none of the specifications allege that the actions taken by the petitioner were taken deliberately, wilfully, in bad faith and obstructed judicial duty. The judge has failed to charge and find that the petitioner did not act in good faith and has failed to find that petitioner did not act in what he considered to be the honest discharge of his duties as an advocate for an accused in a criminal case. Nor has the trial judge found that any of the acts charged to the petitioner obstructed the trial or impeded it in any way. Deliberate intent and obstruction of judicial duty must be charged and proven before an attorney can be held to be in contempt of orders and rulings of a Federal court. *In re Watts and Sachs*, 190 U. S. 1, 32, 35; *Ex parte Hudgings*, 249 U. S. 378, 383; *Clark v. United States*, 289 U. S. 1, 11. In the absence of such charges and findings and the establishment beyond a reasonable doubt of a deliberate intent to take actions in defiance and obstruction of court rulings, there is no contempt. *In re Cottingham, et al*, 66 Colo. 335, 182 P. 2; *Tracy* v. *State*, 28 O. Cir. Ct. Rep. 453; *State* v. *Stillwell*, 8 Or. 610, 157 P. 970; *Krueger* v. *Krueger*, 32 S. D. 470, 143 N. W. 368; *In re Dealton*, 105 N. C. 59, 11 S. E. 244. The basic reason underlying these decisions is that the preservation of the independence of

the Bar is vital to the due administration of justice. Its members should not be imprisoned for errors in judgment when they act in good faith and in the honest belief that their actions are justified and are taken in the interests of their clients.

As the respondent has elected to avoid arguing the constitutional questions involved we submit that our contentions concerning these constitutional questions are conceded. Because respondent discusses only the merits we will consider the affirmed specifications and their merits.

SPECIFICATION ONE.

On Numerous Occasions He Made Insolent, Insulting and Offensive Remarks to the Court and Was Guilty of Gross Discourtesy to the Court.

As the citations relied upon by the judge concern objections and motions concerning the judge's conduct and relate to rulings on evidence, and the propriety of questions, certain fundamental principles should be considered in dealing with this particular finding. Objections of an attorney if wrongfully criticized in the presence of a jury by a judge is prejudicial. *Shephard* v. *Brewer*, 248 Mo. 133, 154 S. W. 116. When a judge states that an objection made by counsel is ridiculous and threatens counsel with fine and imprisonment, the judge's conduct is wrongful and prejudicial. *Bennett* v. *Harris*, 124 N. Y. Supp. 797, 68 Misc. 503. It is prejudicial error for a judge to reprimand counsel for interposing proper objections to conduct deemed wrongful by him on the part of opposing counsel or the judge. *Adams* v. *Fisher*, 83 Nebr. 686, 120 N. W. 194. Every latitude on the admissibility of evidence should be given an attorney for pressing his claims and he should be permitted to propound legitimate arguments, express his points of view and protest erroneous rulings even though the attorney may be honestly mistaken. *Chula* v. *Superior Court in and for Orange County*, 240 P. 2d 398. We will now demonstrate that the judge's citations do not sustain specification one.

(1) June 4, 1952. (R. 78-79). Full comprehension of this charge requires a reading of R. 74-79. Analysis discloses that petitioner caused a subpoena *duces tecum* to issue to the witness Hodges of Erie, Pennsylvania, mother of the complaining witness. She appeared to testify. Previously petitioner offered to examine her in the prosecution's case as a convenience to her, but this was declined. Later, the judge indicated some concern about keeping the witness in attendance because of reasons personal to the witness. To accommodate Mrs. Hodges, petitioner called her out of turn. After certain preliminary questions, petitioner asked her whether she came to testify under subpoena. Without objection by the prosecutor, the judge interrupted and excluded the question as immaterial. Petitioner objected to the interruption and stated he wanted the opportunity to present what evidence he could from the witness. This was a proper request as the witness was testifying early in the trial out of order, the subpoena called for certain correspondence, she was to leave the jurisdiction and the defendant's case was not in. The judge considered this objection as insolent, whereupon petitioner denied that he meant any insolence. Petitioner, on reconsideration, stated that he preferred to wait and question the witness at the proper time in his case. The judge ordered petitioner to proceed with the examination. Petitioner complied. Petitioner's objection to the judge's interruption also was directed to the prosecutorial attitude of the judge in ruling out questions which were not objected to by the prosecutor. Not only do we find no contempt in this situation, but the court below, while it was divided as to the effect of the judge's conduct on the fundamental fairness of the trial, nevertheless, concluded that the trial judge did assume the functions of an advocate (R. 281) and this is an instance of that conduct.

(2) June 4, 1952 (R. 81-82). While petitioner was examining Mrs. Hodges, the mother of the complaining witness, the prosecutor made an objection which was vigor-

ously sustained by the judge. Thereupon petitioner noted his objection to the vigor of the judge's ruling in the following manner:

> If Your Honor please, I object to Your Honor raising your hand and leaning forward and looking at the District Attorney before he makes an objection.

This objection was made because petitioner believed and stated for the record that the judge was thus inviting objections by the prosecutor where perhaps none would be made. The judge did not deny this conduct. Counsel were called to the bench and the judge termed petitioner's objection as insolent and threatened to send him to jail at the conclusion of the trial. In order that the record might be clear, petitioner at the bench and out of the hearing of the jury asked the judge:

> Didn't Your Honor do that?

The judge refused to answer the question and told petitioner he had no right to address questions to the court and then characterized petitioner's conduct as unethical and discourteous and again threatened him with jail. He promptly informed the judge that he intended no discourtesy but was following the procedure suggested by our Court of Appeals for describing in the record events involving a judge as they occurred at the trial. As the judicial conduct of the judge was questioned by the petitioner in good faith, he believed what he was doing in conformity with the opinions of the court below in the cases of *Butler* v. *United States, supra, Billeci* v. *United States, supra* and *Vinci* v. *United States, supra.* If the personal conduct of a judge is such that counsel believes it should be reviewed because of its prejudicial effect, threats of contempt should not deter counsel from noting his objections. Here the objection was made in a respectful manner and the judge's characterization of the objection as insolent and contemptuous can be ascribed to his personal sensitivity to objections regarding his personal behavior

in the case. Petitioner's actions in courteously noting his objections were in no sense contemptuous.

(3) June 4, 1952 (R. 113-114). At a bench conference petitioner out of hearing of the jury noted his objection to the interference by the judge in the cross-examination of the prosecution witness Kilpatrick and to the statement by the judge forbidding petitioner to speak or object while the witness was testifying. This objection was respectfully made but was resented by the judge. Where counsel intends to question on review the judicial conduct of the judge, counsel certainly has the right to describe the judge's conduct on the record, and we question whether any trial judge could enter a valid order forbidding counsel to interpose objections to the judge's conduct. Nevertheless, the position of the judge here was, because the objection as made was directed to his personal actions in the trial, that the objection itself is contemptuous. We submit the record shows otherwise and the court below has so held. *Billeci* v. *United States, supra. Butler* v. *United States, supra. Vinci* v. *United States, supra.*

(4) June 4, 1952 (R. 115). A discussion arose concerning a diagnosis made by Dr. Kilpatrick regarding the factors taken into consideration by him in forming his opinion. Petitioner addressed the judge as follows:

> I want him (Kilpatrick) to read what is there and he wants to ask the court whether he should read what is there, but he had previously said that he had read them and had considered them.

The judge thereupon characterized petitioner's demeanor as follows:

> Don't be so nervous.

Petitioner apologized and informed the judge he was not nervous, to which the judge responded:

> I think you will have to change your tone.

Petitioner replied:

> I don't mean it.

Obviously, sensing that petitioner was upset, the judge suddenly informed him to change his tone. At this time there was no suggestion from the judge that anything petitioner did or said was regarded by the judge as contemptuous. By now efforts of petitioner to note for the record the failure of the judge to act impartially caused almost any exchange between the judge and petitioner, which involved any criticism by petitioner of the judge's conduct, to be used by the judge as the subject matter of a contempt citation. It is not surprising in such circumstances that petitioner became alarmed. The hostility of the judge toward petitioner became more obvious with each objection he noted. The court below found that the judge displayed "hostility" and "bias" against petitioner (R. 280, 281) and this is an instance of that hostility. Surely objections made by an attorney to judicial behavior, courteously stated as here, are not offensive to the dignity of the court and do not constitute contempt. *Whitaker* v. *McLean*, 73 App. D. C. 259, 118 F. 2d 596; *Billeci* v. *United States*, *supra*.

(5) June 5, 1952 (R. 133-134). We submit that this instance is but another example demonstrating the propensity of the judge to magnify out of context petitioner's conduct. A question propounded to the witness Kilpatrick which might have been asked on the preceding day became the subject matter of an exchange between the judge and petitioner. The record reveals only that an exclusionary ruling to a particular question was made by the judge which petitioner obeyed (R. 134). Certainly that is not contempt. *Caldwell* v. *United States*, 28 F. 2d 684.

(6) June 5, 1952 (R. 146). Following the luncheon recess, counsel approached the bench. Out of the hearing of the jury petitioner made a motion for a mistrial on the ground that the judge left the bench in the middle of a

motion being made by him for a mistrial just before the recess. The judge in disposing of this motion denied it in the following derisive manner:

> I am denying the motion. I think I will go through the transcript and make up a score card for the number of motions you made for a mistrial during the course of this trial.

As petitioner believed that the judge was speaking in tones loud enough for the jury to hear, he objected as follows:

> I object to that. I think your voice carries more than Your Honor realizes.

Petitioner was fully justified in making this objection for the reason that the judge's remark was derisive and belittled petitioner and the jury should not have heard this prejudicial ruling of the judge. The judge was under the duty of making this ruling calmly and not in the hearing of the jury. *Billeci* v. *United States*, *supra* (p. 402). Accordingly, we see no contempt in petitioner noting the objection which he did at the bench and if he had not noted his objection in view of the derisive character of the judge's ruling, petitioner would have been derelict in his duty to his client.

(7) June 5, 1952 (R. 154-155). Petitioner rose to note an objection but before he could state it the judge signaled him with his hand to sit down. To this conduct petitioner noted his objection. To this objection the judge commented:

> Will you keep your seat or I will have the Marshal make you resume your seat.

Here again is an instance where an objection interposed to the treatment of petitioner by the judge was treated in a derisive and threatening manner. Later the judge construes this objection as contempt. Yet petitioner was only doing his duty in making what he thought was a proper objection. *Billeci* v. *United States*, *supra*, (p. 402).

(8) June 6, 1952 (Br. 157-158). At this point in the trial in the course of the examination of the witness Sullivan several interruptions were made by the prosecutor and the judge. Petitioner stated that he found it difficult to examine the witness in the face of such interruptions. The judge denominated this objection as discourteous. Petitioner assured the judge that he meant no discourtesy nor did he mean to be repetitious in his questioning and before he could complete his statement the judge cut him off and exclaimed:

> You must not address the court in that manner. I am going to exclude that question as repetitious.

The judge having ruled, petitioner followed that ruling and proceeded to the next question. This exchange between the judge and petitioner fails to justify a contempt charge. *Caldwell* v. *United States*, 28 F. 2d 684.

(9) June 6, 1952 (R. 160-162). The foundation for this charge arose when petitioner made an objection to the presence and position in the court of the prosecuting witness, Mary Ott. She was occupying a prominent place in the front row in plain view of the jury. The judge ruled that she could remain as a spectator. Whereupon the prosecutor volunteered the following remark:

> She has not been released from a subpoena for the Government.

Thereupon the judge stated it was permissible for her to sit anywhere she chose. Petitioner objected and the judge asked to what he addressed his objection, to which petitioner replied that he was objecting to the "long dissertation" about it.

> I made no argument. Your Honor has not permitted me to make any argument and I merely object to Mr. McLaughlin——

At this point the judge interrupted petitioner, stating:

> I think you are getting very discourteous to the court.

According to the record, petitioner was not permitted to complete his objection, as was his right, (*Billeci* v. *United States, supra*) and was endeavoring to point out that he was objecting to the unsolicited remark of the prosecutor, made apparently for the benefit of the jury to justify the disconcerting position in the court of the prosecuting witness. It was also petitioner's belief that the witness had occupied that position in order to signal other witnesses for the prosecution. We submit that the objection of petitioner was valid and when he tried to explain the nature of his objection the judge cut off that explanation. Nevertheless, even in this situation petitioner made no further statement and the trial proceeded. We submit that no contempt can be spelled here. No more was done by petitioner than another attorney was upheld for doing before the same trial judge in *Butler* v. *United States, supra.*

(10) June 9, 1952 (R. 177-179). Restoration of the text involved in this instance will show that the judge regarded the objection noted to his judicial conduct as personally offensive. The event mentioned in the judge's certificate is traceable to the gestures and mannerisms of the judge, including the raising of his voice within the hearing of the jury. After this objection was entered, the judge without denying that the conduct charged to him had occurred, exclaimed to petitioner:

> Go back to the counsel table or I will have the Marshal put you there.

Petitioner attempted to make a proffer and offered to submit to the judge a case which he believed should govern the ruling in connection with the question involved. The judge belittling the principle of law urged by petitioner,

informed him that the judge knew "Hornbook law" and directed him to return to the counsel table. When petitioner registered objections to the judge's gestures and mannerisms at the bench, the judge said:

> You have been very discourteous to the court throughout this trial and you have forfeited the right to that courteous treatment which this court extends to all members of the Bar.

Petitioner immediately informed the judge that he was not discourteous but that it was his duty to object to the actions of the judge in raising his voice from time to time. The judge did not deny this conduct but replied to counsel as follows:

> Yes, and I shall deal with the matter at the end of the trial.

This exchange demonstrates how impatient the judge became when objections to his gestures and mannerisms were made, even out of the hearing of the jury, and the judge made it plain he did not intend to be courteous to petitioner thereafter. Accordingly as petitioner made such objections, the judge became caustic and addressed petitioner in a discourteous manner and threatened him. We submit that the petitioner was guilty of no discourteous conduct under these circumstances. He was merely performing his duty to his client. *Butler* v. *United States, supra; Billeci* v. *United States, supra.*

(11) June 9, 1952 (R. 195-196). The gist of the judge's charge of contempt in this instance appears to be predicated upon the following objection noted by petitioner:

> Now, if Your Honor please, I object to your raising your voice at me and shaking your hand in that manner and appearing to reprimand me.

The judge did not deny that he had raised his voice, that he had shaken his hand or that he had reprimanded the

petitioner, but simply regarded the suggestion itself as contempt. As Mr. Justice Jackson said in the *Sacher* case, men who have become judges sometimes exhibit vanity, irascibility, narrowness, arrogance and other weaknesses to which human flesh is heir. Most judges, however, do not resent an objection, even when it is directed to the judge personally. In cases wherein judges have not been properly detached from the cause, counsel have successfully secured reversals. *Whitaker* v. *McLean, supra; Butler* v. *United States, supra.* A trial attorney in his efforts to protect the rights of his client should be free to enter upon the record such conduct of any trial judge which the attorney believes destroys the court's impartiality or prejudices his client's case, as was held by the court below in the *Billeci* case. We think the significant thing is in the instant case where objections were made to the judge's conduct, that the conduct was not denied but the making of objections thereto are treated as personal contempts. We submit there was no contempt and that the judge here was under the duty of considering that such objections were not discourteous and were not insolent. *Schmidt* v. *United States*, 115 F. 2d 394, 398.

(12) June 10, 1952 (R. 209-210). Apparently at the middle of page 209 the judge unnecessarily raised his voice and shouted to petitioner "Hand it to the Clerk." Petitioner objected to the judge raising his voice and shouting. The judge did not deny that he had raised his voice and shouted, but regarded petitioner's objection as insolent, contumacious and an attempt to provoke a mistrial. On that state of the record petitioner moved for a mistrial because of the judge's aspersions that petitioner was trying to create an episode to cause a mistrial. Petitioner (R. 210) explained that he had only been trying to make a proffer of evidence. Again, petitioner requested the judge to correct any adverse impression on the jury because of the attitude of the judge as shown by his gestures and the intonation of his voice. No such admonition was given the

jury. This failure of the judge to so admonish the jury was criticized by the Court of Appeals. That court ruled that minimal precautions required such an admonition (R. 281-282; and see erroneous footnote 15 of respondent's Brief, p. 35). The judge did not deny the conduct charged but regarded the objections made as contempt because directed to his personal manner of officiating at the trial. If this conduct of petitioner be contempt, similar objections of counsel following the ruling in *Billeci* v. *United States*, *supra*, p. 462, to the trial judge's methods or mannerisms, no matter how well founded in fact, would likewise constitute contempt. This cannot be the law.

(13) June 10, 1952 (R. 215-216). The incident regarded by the judge as discourteous involves the examination of the witness Jones, a "boyfriend" of the complaining witness. Petitioner objected to the judge yelling at him. The judge did not deny raising his voice but said if petitioner said "another word" he would have the Marshal "gag" him. Further, the judge wrongfully charged petitioner with interrupting the witness before he completed his answer. Petitioner denied interrupting the witness. When the question was put to the witness as to whether or not he had completed his answer, he answered in the affirmative. The charge of the judge, therefore, was unfounded. The judge then charged the petitioner with exhibiting "a menacing manner" toward the witness but the record fails to show in what respect counsel menaced the witness. When petitioner noted his objection to the characterization by the judge of petitioner's alleged menacing manner, the judge simply replied:

> It seems so to the court.

Since the record is silent as to what activities of the petitioner the judge considered menacing, it is difficult to understand how counsel, directing his questions to a witness from the counsel table, could "menace" a witness. In fact, when petitioner sought information concerning the judge's

d actions, he was met with the comment of the
. 217):

ow the Court doesn't invite any replies to its
ents."

cited conduct of petitioner can be considered con-
not seen.

une 10, 1952 (R. 221-222). We submit the record
at the trial judge assumed in many instances the
he prosecutor, and the court below has sustained
r's objections in this regard (R. 281). In fact,
judge conducted major examinations in some in-
ad made numerous *sua sponte* objections to ques-
pounded by petitioner. This conduct of the trial
is condemned by all judges of the Court of Ap-
being not required by the trial judge's obligation
in a firm and salutary control over the proceed-
281-282). On this day petitioner noted an objec-
he judge "looking over at counsel when I ask a
and then Mr. McLaughlin stands up." Petitioner
e objection because he believed that the judge
ding objections to the prosecutor. The facts on
s objection was made were not denied by the judge
egarded the *making* of the objection as insolent.
ction was made in a normal tone and is but one
es of courteous objections to the conduct of the
hich conduct petitioner believed to be objection-
prejudicial as deviation from the desirable judi-
ard. And the court below has sustained petitioner
g that "the excessive injection of the trial judge
examination of witnesses, his numerous comments
e counsel * * * demonstrated a bias and lack of
lity," and the judge should have "restrained his
ion of the examining process" (R. 281-282).
e, petitioner was justified in objecting to such
as he had the right to anticipate that if the record
nduct was clear, a conviction obtained under such
ances would be reversed, and that is precisely

what occurred on appeal. The case was reversed chiefly because of this conduct of the judge which petitioner objected to. These valid objections cannot now be said to have been contemptuous and we submit it was petitioner's duty to make them as he did. *Billeci* v. *United States*, *supra*.

(15) June 10, 1952 (R. 228-230). During the examination of the witness Steerman, the following colloquy is made the basis for contempt:

> THE COURT: What is the exhibit?
>
> MR. MCLAUGHLIN: It is the statement of Miss Ott and it was really for the purpose of trying to impeach the witness.
>
> THE COURT: You may not use that in connection with this witness.
>
> MR. OFFUTT: May I ask my question without interruption by the Court?
>
> THE COURT: You may not show that to the witness.
>
> MR. OFFUTT: May I ask my question before an objection is made and not be interrupted?
>
> THE COURT: I shall not permit you to show that to this witness.

At the time of this colloquy, the judge did not regard the question addressed to him by petitioner as contemptuous. Hence, it is difficult for us to understand how a retroactive charge that the question constituted contempt could be valid. Merely making inquiry of a judge during the examination of a witness as to whether a question can be put without interruption in order to obtain a ruling thereon as to its admissibility, is not contempt. Proper trial procedure required that the question first be propounded before an objection to the question could be made and a ruling be made thereon by the judge. *Caldwell* v. *United States*, *supra*.

(16) June 10, 1952 (R. 230-231). This represents but another of a series of objections lodged by the petitioner against the atmosphere of the trial and against the con-

duct of the prosecutor. On this day petitioner was examining the prosecutor in an effort to connect him with knowledge of a telephone call made by the complaining witness to petitioner during the trial, in an effort to show that the prosecutor was in fact responsible for that call. Petitioner asked the prosecutor if there did not come a time on June 1st after the case started when the prosecutor learned that Mrs. Ott had called petitioner at his home from the Sex Squad Room. The prosecutor answered: "No-no; no; no." (R. 230). Notwithstanding that he had answered the question with four denials, he volunteered the following facetious statement:

> That morning I got up about eleven o'clock and went down to St. Patrick's Church, and then I went out to the ball game.

Petitioner promptly moved that this remark be stricken, whereupon the prosecutor continued to volunteer further facetious evidence and stated:

> That is my entire day.

Petitioner also moved to strike the second remark, whereupon the judge, apparently highly amused, smiled. Petitioner objected to the judge smiling, contending that he was entitled to have his question answered and the judge should not permit the prosecutor to be facetious with petitioner. Notwithstanding that the judge agreed with petitioner that he was entitled to a serious answer, the judge did not deny that he had smiled, refused to strike the facetious explanations of the prosecutor and charged petitioner with being insolent in objecting to the manner in which the judge handled the situation. Petitioner's position, we submit, was proper. He moved the court to strike the volunteered and facetious remarks of the prosecutor and he was entitled to have the judge rule on that motion in a serious and dignified manner. Petitioner properly objected to the court smiling because petitioner was of the

opinion that this conduct reflected an attitude on the part of the judge which would impart to the jury a spirit of levity in a matter considered important by petitioner in the defense of the accused. We submit when a judge thus departs from ordinary standards of dignity in the trial of a serious criminal case and counsel notes an objection to that conduct for purposes of review, that objection does not constitute contempt but follows the ruling of the court below in *Billeci* v. *United States*, *supra*, p. 402.

SPECIFICATION TWO.

On Numerous Occasions, He Persisted in Repeating Questions Previously Excluded by the Court in Order to Evade the Court's Rulings in Spite of Admonition by the Court to the Contrary. Many of these Questions Were Obviously Intended to Besmirch a Witness.

It is the general rule that an attorney may ask questions calling for a ruling on the admissibility of evidence and the asking of such questions is neither misconduct nor contempt of court. The reason being that trial procedure ordinarily requires that a question be asked before a ruling can be made as to whether or not that question is proper or whether the evidence elicited by the question is admissible. *Harris* v. *H. W. Gossard Co.*, 185 N. Y. Supp. 861, 194 App. Div. 688. Surely the asking of a question which is objected to and which is excluded should not furnish foundation for a contempt charge when counsel has the right to submit the question for a ruling. We ask how else could counsel proceed in asking questions. If the mere asking of an irrelevant, immaterial or objectionable question can be used as a basis for a contempt citation against an attorney in a criminal case, virtually all members of the Bar would soon be decimated. The following decisions should be considered under specification two: *Caldwell* v. *United States*, 28 F. 2d 684; *Sprinkle* v. *Davis*, 111 F. 2d 925. A further principle should be borne in mind and that is that actions taken by counsel, even though he may be mistaken as to the law, should not be considered

as contemptuous unless the evidence shows beyond a reasonable doubt that counsel is guilty of a willful, deliberate and intentional violation of a court order or ruling. *In re Watts and Sachs*, 190 U. S. 1, 32, 35.

We will now examine specification two and its citations.

(17) June 3, 1952 (R. 54-55). While petitioner was cross-examining the prosecutrix the judge excluded any reference to what George Christianson, her paramour, had said. Petitioner then reframed his question as follows:

> You said that George objected to it. When did he object to it? Give us the date.

The prosecutor objected. The judge objected. Whereupon, petitioner informed the judge that he did not want the conversation and that he had misunderstood the judge's ruling. At the time of this incident the judge did not regard the question as contempt and stated:

> You (petitioner) can't be as stupid as all that. Do not transgress my ruling again.

While we submit that it was improper for the judge, in the presence of the jury, to call petitioner "stupid" and petitioner could well have shown resentment to this statement, nevertheless, petitioner restrained himself and when the judge ordered him to proceed with his questioning, he did so. The incident was thus closed and it was not referred to by the judge again until the certificate of contempt was filed. We submit that petitioner's conduct was not contempt. *Caldwell* v. *United States, supra; Sprinkle* v. *Davis, supra.*

(18) June 13, 1952 (R. 56-58). The record shows, while no question was pending, that the prosecuting witness Ott made a voluntary statement (R. 56). Petitioner called this improper statement to the judge's attention by saying:

> Just a moment. Listen to that, Your Honor, I ask you to admonish the witness.

Whereupon the judge responded:

> Just a moment, you have no right to address the court that way. You have no right to say to the court "Listen to that, Your Honor."

We submit that counsel had a right to call the attention of the court to the fact that the prosecuting witness was volunteering evidence and this did not constitute contempt. On this day counsel also directed the following question to the complaining witness:

> Mr. Christianson was still working at the Riggs Bank then, wasn't he?

In sustaining an objection, the judge said:

> I told you that you may not inquire concerning Mr. Christianson's activities on cross-examination of this witness. If Mr. Christianson should be a witness, you may cross-examine him as to his activities, but you may not cross-examine this witness.

When counsel requested permission to approach the bench to explain his position, the judge denied this request, and it appears that petitioner promptly obeyed the judge's ruling. We fail to see in what respect counsel "persisted in repeating questions previously excluded." This citation does not support that charge. *Caldwell* v. *United States, supra; Sprinkle* v. *Davis, supra.*

(19) June 3, 1952 (R. 58-59). This specification rests upon the following language:

> QUESTION: (By Mr. Offutt) Did anyone else discuss the fact, any of the facts with Lt. Ernst to your knowledge?
>
> MR. MCLAUGHLIN: I object to this Your Honor.
>
> THE COURT: Objection sustained.
>
> MR. OFFUTT-QUESTION: Didn't Lt. Ernst call somebody in your presence and ask about this case when you went to see him?
>
> MR. MCLAUGHLIN: I object to this.

> THE COURT: Objection sustained. Now, I told you that I will not permit another question asked about that conference because you exhausted the entire field yesterday and I suggest to you that you must not transgress my ruling.

We submit on the cited facts that there was no contempt. Promptly when the judge ruled, petitioner acquiesced respectfully in that ruling and proceeded.

(20) June 3, 1952 (R. 59-60). As part of the defense it was petitioner's theory that a strong hypothesis existed that one of the two abortions charged was committed by the prosecuting witness herself. In his cross-examination of this witness, petitioner endeavored to develop that she was responsible for the abortion. The mere denial by the witness Ott that she committed the abortion does not justify a finding by the judge that "he saw or heard a contempt." When the judge called petitioner to the bench, he sought the basis for petitioner's question. Petitioner informed the judge that he derived his information from Dr. Kilpatrick and from the hospital records. If the charge that petitioner "besmirched" this witness by inquiring whether she herself committed the abortion is sustained, we respectfully submit that a defendant in a criminal abortion case would be seriously restricted in developing his defense. It must be remembered that the defendant vehemently denied that he had any connection with the abortion. It was consistent with his defense to demonstrate that the prosecuting witness herself was not only capable of committing an abortion, but had actually had experience with abortions. Further, the evidence was admissible on credibility and the court below so held (R. 274) and in *Thompson* v. *United States*, 30 App. D. C. 352. Hence, petitioner was justified in doing what he did and no contempt occurred.

(21) June 3, 1952 (R. 62). This citation shows only that petitioner made an inquiry of a witness, whereupon the judge interrupted stating:

> Just a moment, you have asked that question twice and I will not permit it a third time.

It does not appear that petitioner transgressed that ruling. The only other incident on this page of the record is that the judge advised counsel how to accent the name Kilpatrick. Obviously, no contempt occurred on this occasion. *Caldwell* v. *United States, supra; Sprinkle* v. *Davis, supra.*

(22) June 4, 1952 (R. 84-85). A fair appraisal of the cited portions of the record which concern the examination of the witness Hodges, mother of the complaining witness, fails to show that anything took place except exclusionary rulings of the judge to a question as irrelevant. The ruling was that any conversation between the witness and the petitioner was not admissible. At the time of this ruling there was not the slightest suggestion on the part of the judge that he considered this question contemptuous. The mere repetition of a question by counsel where *two* separate charges of abortion are involved and which involve *two* separate states of fact under the involved circumstances of this case is not contempt. The question by petitioner to the witness was:

> When was the first time you saw me or talked to me after you came to Washington.

How the asking of such a question could be considered to be contempt is not seen. *Caldwell* v. *United States, supra.*

(23) June 4, 1952 (R. 122-123). During the examination of Dr. Kilpatrick, the judge made a ruling limiting the admissibility of certain hospital records. Obviously, this ruling was erroneous because the doctor admitted (R. 108) that he had read the entire record of the patient and that he had used that entire record, including the history furnished by the patient, as the basis for his opinion. Petitioner accordingly asked Dr. Kilpatrick the following questions:

> And did you not in connection with a study of the chart of the patient read that the patient had been treated in a psychiatric ward in 1950, Sir?

The judge *sua sponte* said:

> Just a moment. I am excluding that. That is not proper cross-examination.

Aside from this interjection and erroneous ruling by the judge, limiting petitioner in his attempts to develop by cross-examination of Dr. Kilpatrick the medical background of the prosecuting witness and proceeding on the assumption that the ruling regardless of error must be obeyed, we submit that a reading of these pages of the record does not disclose contempt. A question directed to a medical witness with respect to the psychiatric treatment of a prosecuting witness in a case in which there were two abortions concerning that witness and under the issues raised by the defense concerns, in our opinion, material and relevant evidence. Nevertheless, we submit it is significant that when the judge announced his ruling, counsel complied with that ruling. We submit it cannot seriously be contended that the questions here asked were asked at the peril of counsel. Before any question can be determined to be proper or improper, it must first be asked. *Caldwell* v. *United States, supra*, p. 684.

(24) June 5, 1952 (R. 129-130). We submit that this citation shows an unreasonable attitude of the judge against petitioner. During the examination of the witness Kilpatrick, petitioner asked him whether he had talked to the prosecutor. The judge interjected (R. 130):

> You have already asked him that and he has answered the question. Now you have to have some terminal facilities.

Petitioner explained to the judge that it was difficult for him to keep his powers of thought as he did not remember

whether he had asked that question, that he did not mean to be repetitious and apologized to the judge, explaining that he was sorry if his memory was not as good as that of the judge. Petitioner also pointed out to the judge that when the judge moved quickly while he was interrogating a witness and jumped from his seat to the desk as if he were about to reprimand petitioner, that upset petitioner and made him nervous. We submit the occasional honest repetition of a question should not form a basis for contempt nor should an attorney be held in contempt when he respectfully suggests to a trial judge that certain of the judge's personal mannerisms upset the attorney and make him nervous.

(25) June 5, 1952 (R. 131-132). This exchange between the judge and petitioner fails to show that petitioner did anything that could be construed as contempt. The judge *sua sponte* made two exclusionary rulings against questions asked by petitioner. The judge answered an inquiry by petitioner as to what his exclusionary ruling concerned, as petitioner explained that he did not want to transgress the judge's ruling. We invite the reading of this portion of the transcript as it demonstrates the facility of the judge in retroactively finding contempt where none in fact existed.

(26) June 5, 1952 (R. 135-136). Petitioner propounded a question to the witness Kilpatrick which he later attempted to withdraw over the objection of the prosecutor. The judge felt that even though petitioner withdrew his question that the witness should answer "in fairness to the jury." We submit it is not contempt upon reconsideration by examining counsel to withdraw a question. As we understand trial practise, counsel has a right to withdraw a question before it is answered. It was the privilege of the prosecutor to ask the question upon his redirect examination if he deemed an answer desirable. No contempt occurred here.

(27) June 5, 1952 (R. 144). Petitioner was cross-examining George Christianson, paramour of the prosecutrix, and asked this question:

> She was not your wife. Isn't that right?

Christianson answered:

> That is right.

The judge interposed:

> We have been over that. She admitted she was not his wife.

The fact that Mary Ott had so testified did not bar petitioner from asking the question of her paramour. But let us assume that the question was somewhat repetitious, the fact that the judge felt that this question might be repetetious because *another* witness had testified to the same fact forms no basis for a contempt citation. If that be so corroborating evidence would not exist. An examination of the record reveals that the judge was inclined to treat any question that had a tendency to be repetitious as a contempt. We say this type of question is inflated out of all proportion for the purpose of making a contempt citation against counsel.

(28) June 5, 1952 (R. 151). During the cross-examination of the witness Christianson, petitioner propounded several questions which were not objected to concerning the prosecutrix. Petitioner then asked the following question:

> Didn't you know that once before, from what she had—didn't she tell you that once before she was to have a baby and she tried her best to stop having a baby?
>
> ANSWER: No.
>
> MR. MCLAUGHLIN: I object, your Honor, there is no such testimony.
>
> THE COURT: Objection sustained.

As the witness Ott herself admitted and the indictment charged two separate abortions of her, this question was proper. The judge did not reprimand petitioner for asking the question and merely ruled that the witness could not be asked that question "*while on cross-examination*" which is an indication to us that the judge would have had no objection to the question if petitioner had taken the risk of calling the witness Christianson as his own witness and putting the question to him on direct examination. How this can be treated as a contempt is not seen.

(29) June 9, 1952 (R. 171-172). Petitioner, while examining the witness Graff, informed the judge that there was a conflict in his testimony with that of the witness Christianson. The judge responded that it was not admissible and informed petitioner that he could not contradict a witness on a collateral matter. Although the judge felt there were deviations in details which was natural between two human beings, the judge said he did not see any "real conflict." Except for this discussion, there is nothing in the record reference to indicate that petitioner did anything that would even resemble contempt.

(30) June 9, 1952 (R. 172-173). The following colloquy is the basis for this contempt citation:

> THE COURT: Now don't you understand my ruling that I have excluded that?
>
> MR. OFFUTT: All right.
>
> THE COURT: Don't you dare repeat questions in a different form after I have excluded them.
>
> MR. OFFUTT: If your Honor please, I am sorry to have to object to this, but I object to your raising your voice and shaking your hand at me in the presence of the jury.
>
> THE COURT: Yes, I am going to shake my finger at you some more if you do not behave yourself.
>
> MR. OFFUTT: Now I submit I have a right to make this objection, Your Honor, and I am not doing anything to——
>
> THE COURT: You must behave yourself.

When the question was excluded by the judge, petitioner did not make any further effort to ask the question over again, which is the nature of specification two, but simply objected to the manner in which the judge chastized petitioner with gestures and intonations. The question dealt only with an exclusionary ruling of the judge directed to the witness Graff who was a mere custodian of the records at the District Jail. The discussion between the judge and the petitioner did not result from the question but came as a result of the objection noted by petitioner in a courteous manner to the personal attitude and mannerisms of the judge. This is another example of the judge abusing petitioner in the presence of the jury in a threatening manner (critized below R. 280, 281) because an objection was made by petitioner to the personal demeanor of the judge, made in accordance with the ruling of the court below in *Billeci* v. *United States*, *supra*, p. 402. We see no contempt here.

(31) June 9, 1952 (R. 174-176). Blanche Dobkin was called to the stand as a witness for the defendant. She testified that she was the operator of a rooming house and that a Mr. and Mrs. William *Ott* resided there. The judge stated that he believed such testimony to be immaterial. The prosecutor thereupon conceded that the complaining witness, Mary Ott, was so living at the rooming house. The purpose of the question was to show that Mary Ott was living with a William E. *Jones* and was holding him out as her husband even though she was not married to him. The judge excluded the answer and informed counsel that it was not necessary for him to corroborate this illicit relationship and then in presence of the jury made the uncalled for remark that this relationship was a "side issue that has nothing to do with this case." Certainly petitioner's efforts to show the meretricious relationship of the witness Ott were not contempt. Meretricious relations of witnesses may be shown in a criminal case as they affect morals, hence credibility, and show witnesses in their true light.

Questions to this end are proper and do not "besmirch" the witness. *Thompson* v. *United States*, 30 App. D. C. 352; *Alford* v. *United States*, 282 U. S. 687, 692; *Tia Kow-yel-lee* v. *United States*, 167 U. S. 274. Even the trial judge here involved has so ruled in the prosecutor's favor. *United States* v. *Edmonds*, 63 F. Supp. 968, 973. It was the position of the judge that it was immaterial whether the prosecuting witness lived with another man in a meretricious relationship. It was, as the judge stated, a side issue that had no bearing on the issue on trial because he felt that the guilt or innocence of the defendant was the only issue involved and that meretricious relationships of the principal witness for the prosecution were not material. We submit that the credibility of the complaining witness is a vital issue in an abortion case where that witness claims she was the victim of two separate abortions by the defendant. First, considering the concession of the relationship by the prosecutor and the belief by the petitioner in the materiality of the proffered testimony, it is difficult to conceive under what theory the judge below considers the placing of a witness on the stand to prove an illicit relationship is contemptuous. The witness Dobkin had to be produced in order to obtain a ruling on the admissibility of her testimony. How else can a trial attorney secure a ruling. After the concession by the prosecutor that the meretricious relationship existed, petitioner withdrew the witness in conformity with the judge's ruling. Nevertheless, on the merits the testimony was admissible on credibility as moral involvement by a woman affects her credibility. *Thompson* v. *United States, supra.*

(32) June 9, 1952 (R. 178-180). Counsel approached the bench and each conferred with the judge in a low tone. Petitioner made a proffer of certain parole board records and stated he expected to show that the witness Christianson was on parole in the District of Columbia, that when Christianson made an application for parole the parole board addressed a letter to the complaining witness, Mary Ott, in which she was asked the status of her husband. As

a result it was determined that Christianson was already married (R. 36-39). The judge stated he was going to exclude such testimony as "obviously irrelevant." Petitioner attempted to complete his proffer, which was interrupted several times by the judge, and finally the judge in anger stated that the proffer was an attempt on the part of petitioner to besmirch and subject to adverse publicity persons who testified as witnesses in the case and branded the proffer as "unethical." Petitioner informed the judge that the basis for the introduction of the proffered testimony was to show fraud and to attack the credibility of the witness Ott. Despite the fact that the proffer and the discussion in connection therewith all took place out of the hearing of the jury at a bench conference for the purpose of having the judge rule upon the admissibility of the proffered evidence, we find the judge below now labeling the proffer as a contempt. Certainly a proffer thus made is not contempt. We submit the evidence proffered (R. 36, 37, 39) was admissible on fraud and credibility. *Thompson* v. *United States, supra; Alford* v. *United States, supra; Tla Koo-yel-lee* v. *United States, supra; United States* v. *Edmonds, supra.*

(33) June 9, 1952 (R. 181-183). While testifying on direct examination, the witness Jones was asked by the petitioner whether the prosecuting witness Ott held herself out to be his wife. The judge ruled this testimony by the witness Jones irrelevant and immaterial, stating that the same ruling that had been made concerning the witness Dobkin would be applied. Petitioner objected to the ruling but proceeded with his next question. Obviously, the purpose of this testimony was to place the witness Ott in her true light with respect to her moral character and credibility. Until an exclusionary ruling is made, trial counsel is first obliged to propound a question. A reading of the text fails to show any contemptuous conduct of the nature charged in the specification. We submit that the proffered evidence of the witness Jones was admissible. *Thompson* v. *United States, supra; Alford* v. *United States, supra; Tla*

Koo-gel-lee v. United States, supra; United States v. Edmonds, supra.

(34) June 9, 1952 (R. 190-191). The indictment charged that Dr. Peckham committed one of the abortions on the prosecuting witness Ott on May 2, 1951 (R. 2). May 7, 1951 was a critical date in connection with this charge. Mary Ott testified she was treated by Dr. Peckham on that date. To show that Dr. Peckham could not have seen and treated Mary Ott on May 7, 1951, as she had previously testified, petitioner called to the witness stand Dr. Bernard Tully of George Washington University Hospital (R. 187-190). Dr. Tully testified that Dr. Peckham had been admitted to George Washington University Hospital as a patient on May 6, 1951 and on May 7, 1951 had been operated on for the removal of a disc. Petitioner attempted to develop the details and serious nature of the operation performed upon Dr. Peckham. Dr. Tully described it as a major operation, following which the patient was not permitted out of bed for approximately five to six days. In corroboration of the testimony that the operation was a major one, petitioner attempted to have it described to the jury and asked questions concerning the size of the incision. The trial judge excluded questioning to this end as irrelevant. A reading of the text shows that petitioner complied with the judge's ruling. In view of the positive testimony of the prosecutrix concerning the date May 7, 1951, petitioner considered it essential to have fully described to the jury that on that day the defendant was hospitalized following a major operation and by reason of the nature of his illness and the seriousness of the operation he could not possibly have seen and treated Mary Ott as she testified. Even though the question obviously was admissible for the purpose stated, the record shows petitioner promptly obeyed the exclusionary ruling of the judge. Now the trial judge attempts to use this situation as a basis for citing petitioner in contempt. That is unwarranted.

June 9, 1952 (R. 161 ff.). Ernst, a policeman, was ... concerning a subpoena issued to the witness and also whether he had made a written memorandum concerning an alleged telephone conversation. This line of questioning was objected to by the prosecution and sustained by the judge as irrelevant and immaterial. When objections were sustained counsel did not pursue the same line of inquiry. A fair reading of the text does not show contempt but only that as questions were asked and objections were sustained by the judge, petitioner promptly pursued another line of inquiry. Certainly no contempt occurred here. *Caldwell* v. *United States*, ...

June 9, 1952 (R. 193). Petitioner inadvertently repeated a question to the witness Ernst. When the judge called this to petitioner's attention, he stated that he had been reminded of it by associate counsel and apologized because he was under the impression that he had overlooked the objection. Certainly no contempt is shown in this occurrence. *Caldwell* v. *United States*, *supra*.

June 10, 1952 (R. 219-220). The following colloquy occurred between the judge and counsel during the examination of the witness Jones:

"Mr. Olvetti: May I ask him to read the statement in the second paragraph and see if that will refresh his recollection?

The Court: You have already shown him the statement.

Mr. Olvetti: I want to ask him——

The Court: Just a moment, you cannot ask the witness to refresh his recollection about a matter that the court has excluded. I have excluded this question."

The record shows only that an exclusionary ruling was made which was promptly acquiesced in by petitioner. We cannot see in what respect a contempt occurred.

(38) June 10, 1952 (R. 220-221). Again, during the examination of the witness Jones, the judge made an exclusionary ruling concerning the right of petitioner to examine the witness regarding the credibility of the prosecuting witness. The judge said:

> I have excluded this. I invite no response to my ruling. If you wish, you may note an objection, but that is as far as you may go.

Whereupon petitioner accepted the invitation of the judge and said:

> I object to it.

The judge replied:

> Very well; your objection is noted.

A citation for contempt on this colloquy is unfounded because it shows only a discussion normally occurring between a judge and a trial attorney concerning the admissibility of evidence, the judge's ruling thereon and the invitation by the judge for counsel to object. That was done in a respectful manner. This episode cannot be regarded as contemptuous.

(39) June 10, 1952 (R. 221-222). Again during the examination of the witness Jones an exclusionary ruling was made by the judge who said (R. 222) to petitioner:

> You may note an objection and that protects your record.

Petitioner accordingly noted his objection. We fail to see in what respect the judge could consider petitioner's objection as contempt.

(40) June 10, 1952 (R. 222-223). The citation that a question was repeated is not sustained by the record. The questions asked were different and each question was reframed since the judge's rulings on questions were not

clear and because he frequently forbade petitioner from asking questions concerning his rulings. It was only natural and proper for petitioner, after an exclusionary ruling was made, to reframe his question out of caution in order to properly protect his client's interests. *Caldwell v. United States, supra.*

(41) June 10, 1952 (R. 225-226). During the examination of the witness Jones, the following colloquy occurred:

> MR. OFFUTT: Shall I ask the question before I come to the bench?
>
> THE COURT: Don't address any interrogations to the court.
>
> MR. OFFUTT: I am sorry; I am just asking for your Honor's ruling.
>
> THE COURT: Now don't ask it again.
>
> MR. OFFUTT: All right.

When the judge refused to permit petitioner to come to the bench to pose the question he desired to ask, petitioner had no other recourse in order to protect his client's rights than to ask the question. This was done. An objection to it was sustained and the judge accused petitioner of evading the court's ruling. We submit, as petitioner specifically asked the judge for his ruling concerning this witness and stated he did not want to be accused of evading the ruling and the judge refused to explain his ruling, it is difficult for us to understand how, when the question was then asked for a ruling on it in open court, that can be treated as contempt.

(42) June 10, 1952 (R. 226-227). During the examination of the witness Steerman, the judge vigorously sustained an objection of the prosecutor and raised his hand at petitioner. Whereupon the following colloquy occurred:

> THE COURT: Just a minute.
>
> MR. MCLAUGHLIN: I object to this, your Honor; it is immaterial.
>
> MR. OFFUTT: If your Honor please, I object to your Honor raising your hand like that—I don't——

THE COURT: Now that is an insolent remark.

MR. OFFUTT: I want the record to show you raised your hand.

THE COURT: I think you are losing your mind, Mr. Offutt.

MR. OFFUTT: I am doing what the Lewis case decision says I should do. I want the record to show these things.

We submit the judge here became provoked when petitioner noted for the record the personal mannerisms and actions of the judge. It is the colloquy and the attempt to put the judge's conduct into the record which the judge treats as insolence rather than the questions which were asked by petitioner of the witness Steerman. The questions asked by the petitioner came at the beginning of the examination of Steerman and there was no controlling ruling as to the admissibility of any testimony from this witness. Counsel did only what he was duty bound to do as the court below ruled in *Billeci v. United States, supra*, p. 402.

(43) June 10, 1952 (R. 228). Petitioner was examining a witness on direct examination when one of his questions was excluded by the judge. Petitioner thereupon attempted to make a proffer of evidence as to what the testimony would show and the following occurred:

THE COURT: Now make your tender and make it quickly and briefly.

MR. OFFUTT: I want to show by this witness that——

MR. MCLAUGHLIN: If your Honor please, I think he ought to ask the questions and see whether or not they are admissible.

THE COURT: No. I excluded the whole line of inquiry.

MR. OFFUTT: This is just a tender of proof, Your Honor. Shall I go ahead, Your Honor—he objected, I take it—I want to show by this witness that Mrs. Mary Lee Ott told Mrs. Steerman that her husband was down at Quantico, Virginia——

THE COURT: I am going to exclude all that. That is immaterial. We will stop further tenders. I will ex-

> clude that whole line of inquiry. I told you before, I told you the day before yesterday, I will not permit any testimony as to the personal lives of these people, except as they are connected with this case.
>
> MR. OFFUTT: All right.

Here we have an invitation by the judge for counsel to make a tender; when the tender is made it is cut off and then counsel finds himself adjudged guilty of contempt. This situation we believe requires no discussion.

(44) June 10, 1952 (R. 234-235). In the direct examination of the witness Brown, petitioner asked the witness:

> MR. OFFUTT: I direct your attention to this lady who is seated here in the first row of the courthouse, here, in the light blue dress. Do you know her?
>
> ANSWER: Yes, I do.
>
> MR. OFFUTT: And what is her name?
>
> ANSWER: Beg pardon?
>
> MR. OFFUTT: What name do you know her by?
>
> ANSWER: Mrs. Christianson.

The prosecutor objected although the witness had answered. In such circumstances, the proper procedure on the part of the prosecutor would have been to move to strike the answer, although it is difficult to understand the nature of the objection. The prosecuting witness was being identified by the witness on the stand. The judge said:

> And I gave you considerable leeway on cross-examination because she was a key witness for the Government, and you were entitled, as a matter of right, to leeway in cross-examination, but I am not going to permit you to call witnesses to blacken her character, and I have told you that before.

We submit petitioner acted within permissible limits when he requested the witness Brown to identify the prosecuting witness because that witness knew her by another name and stated so for the record. Petitioner informed the

judge he did not have in mind the purpose mentioned by the judge and asked that the judge correct any impression his statement might have made on the jury. The judge refused to so instruct the jury and this was error (R. 281-282, footnote 14). It is a fundamental rule of trial practise that until a question is asked and the ruling of the judge obtained, that trial counsel would have no way of knowing in advance the position of the court. Here petitioner preserved his point for appeal as was his duty and was not guilty of any contemptuous act in performing that duty.

SPECIFICATION SIX.

On Several Occasions He Asked of Witnesses Questions That Were Highly Prejudicial to the Witness and for Which There Was No Foundation. Thus He Asked Mary Ott, the Victim of the Abortion Charged Against the Defendant, "When Were You Arrested in This Case?" As a Matter of Fact, She Had Never Been Arrested and When Called to Account by the Court, Offutt Only Answered That He Had a Right to Ask Whether the Witness Had Been Arrested in This Case.

A court should hesitate to suspect counsel of not asking questions in good faith, especially where the propriety of the questions is debatable. *Leland* v. *Empire Engineering Co.*, 135 Md. 206, 108 Atl. 570. While petitioner was cross-examining the complaining witness, Mary Ott, he asked the question (R. 50):

> By the way, when were you arrested in connection with this case?

Thereupon the following colloquy occurred (R. 51-52):

> THE COURT: You had no right to say when she was arrested.
>
> MR. OFFUTT: I have no right to inquire as to whether she was arrested?
>
> THE COURT: You did not ask her that. You asked when she was arrested.
>
> MR. OFFUTT: That's right.
>
> THE COURT: That assumes that she was. I am going to make a statement before the jury that that is an improper question.

MR. OFFUTT: I want to ask her if she was arrested.
MR. MCLAUGHLIN: They couldn't arrest her.
MR. OFFUTT: They certainly could.
THE COURT: Well, did they?
MR. MCLAUGHLIN: No.
THE COURT: Don't you know.
MR. OFFUTT: The officers won't talk to me. Mr. McLaughlin told them not to talk to me.
THE COURT: I think that that was quite proper but you could ask Mr. McLaughlin.
MR. OFFUTT: I will put him on the stand and ask him.
THE COURT: Why would they arrest her?
MR. OFFUTT: Because of a number of things.
THE COURT: On what charges?
MR. OFFUTT: They could arrest her on adultery; they could arrest her on fornication——
THE COURT: That's silly.
MR. OFFUTT: Is it silly?
THE COURT: Yes.

In this colloquy petitioner was right in his contentions and both the prosecutor and the judge were wrong. The Ott woman was living in fornication and adultery with Christianson, a felon and a married man. He was the cause of her pregnancy. She and Christianson were both liable to arrest and trial, under District of Columbia Code (1940 Ed.), Title 22, Sections 301 and 1001. At the conclusion of this colloquy the judge directed petitioner to return to the counsel table, since this colloquy took place at the bench. At the time of the occurrence there was no indication by the judge that he considered petitioner's premise false and the judge ruled at the bench that it was "quite proper" for petitioner to ask Mrs. Ott instead of "when," "whether" she was arrested. From the record it is obvious counsel misunderstood his own question and the judge agreed with the general tenor of the question but objected only to the form of it and characterized petitioner's position as "silly" rather than as false. While it is true that counsel did ask the quoted question, we submit that that was proper, as he was cross-examining the witness. More-

over, we submit that the incident which followed, together with the court's instructions to the jury, eliminated any possibility of a misunderstanding. Accordingly, it is puzzling indeed to find at the end of the case that the judge would charge the petitioner with a falsehood under the circumstances disclosed by the record. When the judge ruled that the question as framed was improper counsel proceeded with his examination. We fail to find any contempt in this situation.

(60) June 5, 1952 (R. 151). The complaining witness' paramour, George Christianson, was testifying. It should be remembered that he was an accomplice in procuring one of the abortions charged to the defendant and was the cause of the complaining witness' pregnancy. The testimony also disclosed that Christianson at the time of the trial was in jail for conviction of a felony. The questions propounded to him by petitioner concerning whether or not Christianson had tried to convince the complaining witness as to whether she should or should not have the baby were proper under these circumstances. In previous testimony this witness had vacillated and been uncertain. While Christianson had denied that he had tried to convince the complaining witness not to have the baby, he allegedly accompanied her on at least two visits to procure an abortion. Further, there was testimony that he had furnished some of the money for the abortion. Petitioner should have been allowed full leeway to develop whether or not Christianson was actually an accomplice in and a procurer of the abortion. Christianson was an accomplice and under District of Columbia law was indictable as a principal. *Thompson* v. *United States*, 30 App. D. C. 352. Once one is shown to be an accomplice, credibility is affected and the jury must be instructed to weigh such testimony with great care. *Freed* v. *United States*, 49 App. D. C. 392, 266 F. 1012; *Borum* v. *United States*, 61 App. D. C. 4, 56 F. 2d 301; *Egan* v. *United States*, 52 App. D. C. 384, 287 F. 958. This citation does not sup-

port the charge that a question based on a false premise was asked by petitioner.

No other citations are given by the trial judge nor by the respondent, nor in the Appendix to the respondent's Brief, which support specification six. Hence we submit this specification is without foundation.

SPECIFICATION TWELVE.

He Constantly Tried to Create An Episode That Might Cause the Court to Direct a Mistrial.

We submit that the record will reveal that petitioner believed that he was subjected to harsh and improper treatment coming from the prosecutor and the trial judge, in addition to harrassment. Instances of such treatment have been discussed earlier in this Brief. Petitioner's personal integrity was impugned time and time again by the judge and the prosecutor. He was accused of being stupid (R. 55) and at another point with losing his mind (R. 225). The atmosphere of the trial was such that it upset petitioner. In this strained situation petitioner was attempting, however inadequately, to protect his client, preserve his record and to some extent his own personal reputation. Not only does the record indicate that petitioner was abused by the judge, but he was also abused by the prosecuting attorney (R. 46, 88, 105, 127-128, 137-138, 179-180, 218). When petitioner objected to the prosecutor's misconduct, the judge never rebuked the prosecutor but continued to chide and belittle petitioner. An attorney conducting a trial of a criminal case is entitled to such treatment from the court that the interests of his client may not be prejudiced, not as a matter of indulgence, but of right. *Grock* v. *United States*, 53 App. D. C. 146, 289 F. 544.

The judge should not comment unfavorably in the presence of a jury on the conduct of the trial by counsel for one of the parties. *Christman* v. *Union Railway Co. of New York City*, 205 N. Y. Supp. 594, 210 App. Div. 104 The

judge should not belittle arguments of counsel. *Weinberg* v. *Pavitt*, 304 Pa. 312, 155 Atl. 867. He should overrule such arguments with dignity and should not ridicule counsel. *Schafer* v. *Thurston Mfg. Co.*, 48 R. I. 244, 137 Atl. 2. It is improper for a judge to rebuke counsel in the presence of a jury for asking a question which counsel deems proper. *Cooke* v. *Glassheim*, 202 N. Y. Supp. 599, 207 App. Div. 592. Accordingly, we submit that specification twelve, which has no citations to support it, is without merit.

While the court below divided on the ultimate effect on the trial "of degrading and belittling remarks directed at defense counsel by the judge, restrictions upon cross-examination, the judge's assumption of the function of an advocate, lack of impartiality, and prejudicial remarks by the prosecutor", the majority of the court below were convinced that the judge's conduct "demonstrated a bias and lack of impartiality," which necessitated reversal (R. 281-282). All three judges agreed that the actions of the trial judge "in treading the area reserved for counsel" created conflict and engendered remarks and attitudes on the part of both court and counsel which afflicted the trial (R. 282). In such circumstances we do not see how the objections of petitioner to the judge's improper conduct and to the misconduct of the prosecutor and the motions which petitioner made for a mistrial because of this misconduct can be twisted into contempt on the theory that in making his valid objections and his proper motions, petitioner tried to create an episode which might cause the judge to declare a mistrial. The situations cited by respondent in its Brief (Br. pp. 12-24, Appendix B, pp. 74-82) do not support specification twelve. Accordingly, we again submit that this specification is without merit.

REPLY TO RESPONDENT'S SUMMARY OF ARGUMENT.

I.

Respondent's contention (Br. 25) that petitioner instigated and is primarily responsible for the altercations and incidents which marred the trial, we dispute. Early in the trial, on June 4, 1952, the judge showed his hostility to petitioner first, not because of any questions which petitioner was asking, and threatened petitioner with jail because he in a courteous manner attempted to object to certain mannerisms of the judge and signals being made by the judge to the prosecutor. Thereafter, when any objection was made or any motion was made by petitioner seeking to place in the record the personal mannerisms and misconduct of the judge, those objections and motions were treated as acts of insolence by the judge. This was the crux of the controversy which marred the trial and the primary hostility and first provocation came from the judge and not from the petitioner, and this is what we believe the court below decided when it said (R. 280, 281-282):

> Hostility to counsel was at times displayed by the Court * * *
>
> * * *
>
> The numerous comments to defense counsel * * * demonstrated a bias and lack of impartiality which * * * necessitates reversal.

and when it held the judge invaded "the area reserved for counsel, thus creating conflict * * * which afflicted the trial." (R. 282).

II.

Respondent argues (Br. 25-26) on the erroneous premise that the hostility displayed by the trial judge (R. 280) was caused by petitioner's conduct, petitioner, therefore, can be subjected to a summary judgment of contempt. Respondent argues that if petitioner could escape such punishment, all that any contemnor need do in order to escape

punishment is to resort to conduct calculated to provoke the judge into making prejudicial and hostile comments. Hence respondent says (Br. 25) "sharp retort" from the judge, his disturbed "imperturbability" and his "hostility" show "no basis for disqualifying" him. Of course this is not the law. Due process requires that the judge imposing a sentence be impartial. Provocation begs the point. We submit that respondent skirts the basic constitutional question involved. Respondent's argument narrows down to the contention, if a judge who imposes sentence on an attorney confines his "hostility" to those instances wherein there is a disagreement between the judge and the attorney, that such a hostile judge can still impose a summary contempt judgment against the attorney because of the attorney's conduct in these areas of disagreement. Respondent says that where a judge shows such hostility, that does not mean that he is in any way incapable of fairly adjudicating whether an attorney in disagreement with the judge was guilty of contempt. We canot agree with this tenuous argument. Regardless of what causes a trial judge to manifest bias, hostility and lack of impartiality, if that bias, hostility and lack of impartiality are shown affirmatively during the course of the trial, it makes no difference what brought that hostility into the open.[1] Every accused in any trial, summary or otherwise, is entitled to an impartial judge. *Tumey* v. *Ohio*, 273 U. S. 510. Respondent's argument that all mitigating factors were considered in reducing the sentence misses the constitutional question. As here, it was vigorously argued in *Tumey* v. *Ohio, supra*, that a full hearing was afforded the accused by the interested judge who presided, the evidence clearly showed the accused was guilty of the offense charged and because the sentence was the minimum sentence any judge could impose that the accused could not complain of a denial of due process of law because he was tried by

[1] The remarks of the trial judge in committing petitioner show a prior bias and belief that petitioner should be purged (R. 259-260).

an interested judge. This Court in the *Tumey* case ruled (p. 535) that such arguments do not dispose of the due process question and no matter what the evidence is against an accused, he has the right to have an impartial judge try him. As this Court has decided, if the judge is interested in the outcome of the case or is hostile or prejudiced, the Fifth and Fourteenth Amendments require that the judge be disqualified, because the Nation is entitled to the assurance that every judge is impartial and is free from any bias or prejudice which might disturb the normal course of impartial judgment. And it makes no difference that the lack of impartiality arises during the trial. *Berger* v. *United States*, 255 U. S. 22, 35, 36.

The contention asserted by the respondent was also before the court below in *Whitaker* v. *McLean*, 73 App. D. C. 259, 118 F. 2d 596. In the *Whitaker* case, a felon was seeking to recover money from Mrs. McLean in connection with certain actions he had taken relating to the kidnapping of the Lindberg child. The testimony of the plaintiff Whitaker was provoking and shocked the conscience of the trial judge. The judge *at a bench conference* indicated that he did not believe Whitaker's testimony and characterized Whitaker unfavorably. At the conclusion of the evidence, the trial judge directed a verdict for the defendant, Mrs. McLean. This action was reversed on appeal and a new trial ordered because the judge in making his comment at the bench had displayed hostility toward Whitaker, which the court below held to be a form of bias. Notwithstanding that the testimony and conduct of the plaintiff provoked this comment at the bench and notwithstanding that the court below recognized that judges are not forbidden to feel sympathy or aversion for one party or the other, the court nevertheless held that every party is entitled to a trial by a judge free from bias as an inherent part of a fair trial. As the court below found, if a judge's hostility appears during a trial, that disqualifies him and he may not thereafter enter a judgment in the cause. The *Tumey*,

Berger and *Whitaker* decisions should be a complete answer to the fallacious argument of respondent that "hostility" to a defendant, because provoked, does not disqualify a judge.

REPLY TO RESPONDENT'S ARGUMENT.

I.

As we have pointed out, respondent prefers to argue the merits of the remaining four specifications of the contempt citation before discussing whether they were entered by a hostile and biased judge. Accordingly, respondent contends that petitioner was guilty of contempt and cites *Sacher* v. *United States*, 343 U. S. 1. It is argued that the bulk of the incidents resulted from two methods of approach of petitioner. First, it is argued petitioner persisted in making irrelevant objections and exceptions in order to provoke a mistrial (Br. 27). Second, it is argued that petitioner attempted to introduce evidence which was irrelevant to confuse the jury and to besmirch witnesses and humiliate the prosecutrix, her mother and her friends (Br. 27-28). In support of these contentions certain references are made to the record as examples of petitioner disregarding the rulings of the judge. We have taken every citation on which the judge relied in his certificate and have discussed them in context in our reply to respondent's statement (pp. 9-45, *supra*). We submit on the merits that the quoted instances fail to show any deliberate violation of the judge's rulings. Nor does the fact that the judge on some occasions permitted petitioner to make other objections (Br. 28) in any way aid the contempt citation. We do not believe that this Court is concerned with the details of the trial below which do not relate to the contempt citation. Nor can we agree with respondent's contention that the manner in which petitioner attempted to introduce evidence is contemptuous. Petitioner's manner was courteous at all times. Hence

the case of *Halliman* v. *United States*, 182 F. 2d 880, is not helpful here. Nor does the record show any deliberate design on the part of petitioner to defy rulings of the judge, but, on the contrary, affirmatively shows petitioner did his best to comply with such rulings and yet at the same time protect the interests of his client in connection with those rulings by making a proper record.

Respondent next erroneously brands petitioner's objections to the personal mannerisms and conduct of the trial judge as "rude and discourteous" (Br. 29). Respondent makes the belated argument that petitioner did not comply with the fundamental requirement of the *Butler*, *Billeci* and *Vinci* cases, that objections to the gestures of the trial judge should be made out of the hearing of the jury. This Court should bear in mind in considering this belated contention that nowhere does Judge Holtzoff treat the making of the objections "in open court" as a basis for a contempt. Moreover, the making of objections in open court or at the bench is under the control of the trial judge and not counsel. While it may be preferable that such objections be made at the bench, the matter is still under the control of the judge. The judge, not counsel, controls the trial. On at least ten occasions prior to R. 81, the first example cited by respondent (Br. 28), petitioner's requests to approach the bench were denied and the judge instructed petitioner to make objections, motions and proffers in open court. (Tr. 332, 385). Thus the judge ruled (Tr. 332):

> I think you should apply * * * in open court * * * I don't like to keep things from the jury * * * I think the jury should know what is going on.

And in denying bench conferences to petitioner ruled (Tr. 385):

> You make any statement you wish.

Respondent's argument that petitioner's objections to the conduct of the judge were deliberate insolence and were made in open court for the purpose of "baiting" the judge, is unsound. An examination of the record reveals that petitioner requested the right to approach the bench on ninety-nine occasions. Only twenty-six of these requests were granted and seventy-three were denied. As we have shown early in the case the judge ruled that any statement which counsel wished to make could be made before the jury (Tr. 385). Actually, the trial judge made it plain prior to the June 4th incident that he favored the making of all objections and their disposition in the presence of the jury and that he frowned upon bench conferences (Tr. 332). How under these circumstances respondent can argue with any justification in the record that petitioner was guilty of contempt because certain of his objections and motions occurred in open court, we cannot understand.

In answer to respondent's contention that petitioner was "baiting" the judge, we submit that an examination of each citation of the judge and of each citation relied upon by the respondent will show that petitioner always addressed the judge in a courteous manner in making his objections, his proffers and his motions. Whereas, on the other hand, in these instances petitioner was abused and belittled by the judge and the prosecutor. In these circumstances, we pose the question of who was doing the "baiting."

Respondent also attempts to make something of the fact that petitioner asked of the prosecutrix: "When were you arrested?" (Br. 31). We fully discussed this question in our reply to respondent's statement (pp. 41-43, *supra*). The judge ruled that it was proper to ask this witness if she were arrested, but stated that he did not feel counsel should use the word "when" as that inferred she might have been. The legal niceties of this situation hardly spell out contempt, bearing in mind that petitioner was cross-ex-

ing the witness and had the right to ask leading ques-
s when the record shows that the police officers had
n instructed by the prosecutor not to discuss this case
h counsel for the defendant (R. 51). The statement of
ondent that petitioner knew that she had not been
sted (Br. 31) is contrary to the record which affirma-
ely shows that petitioner did not know that she had
n arrested and was unable to obtain this information
ause of the instructions of the prosecutor that the
cers and witnesses for the prosecution should not talk
the petitioner about the case (R. 51).

Respondent also makes much of petitioner's abortive at-
pt to examine Mrs. Hodges, the mother of Mrs. Ott
. 31). Mrs. Hodges had been served with a subpoena
es tecum because petitioner believed from information
his possession that she had been in correspondence with
r daughter, Mrs. Ott, and the correspondence would tend
establish the defendant's innocence (R. 66). Mrs. Hodges
ed in Erie, Pennsylvania. She appeared pursuant to the
bpoena. Petitioner, as an accommodation to her, offered
examine her out of order. His request was first de-
ied but later the judge, to accommodate the witness,
ve permission that Mrs. Hodges be called out of turn
d examined by petitioner during the presentation of the
ecution's case. When petitioner attempted to ques-
on Mrs. Hodges concerning the subpoena *duces tecum*, ob-
iously for the purpose of finding out whether she had
roduced the letters in question, without objection by the
rosecution, the judge interrupted and excluded this line
f questioning. Petitioner objected to the interruption,
ointing out that he wanted the opportunity to develop all
he facts that he could from this witness for the obvious
eason that the materiality and relevancy of her testimony
ould only be determined after all the evidence was in for
he defense. Petitioner believed he should be permitted
o examine the witness freely and without interruption,
with materiality and relevancy reserved for later decision

when the defense testimony was completed. During this examination the judge signaled objections to the prosecutor. Under these circumstances, petitioner stated he preferred to withdraw the witness and to examine her in her proper place in the presentation of the defendant's case. This reasonable request was denied. Petitioner was ordered to continue with the examination. Petitioner obeyed the judge and the examination of the witness was completed within the limited field permitted (R. 74-79). Respondent's statement that the examination was full of irrelevancies and that petitioner engaged in a tirade finds no support in the record. If the Hodges' examination is considered by the respondent to be a "good example" of contempt, we submit respondent's case rests upon a very slender reed. We flatly disagree with respondent's contention that the efforts of petitioner to show the details of Mrs. Ott's private life and her prior experiences with abortions was a deliberate effort to inject into the record prejudices and irrelevancies as argued by the respondent (Br. 32). We have discussed the relevancy of the evidence attempted to be elicited from Mrs. Ott in our reply to respondent's statement. The record fails to support respondent's contentions that these efforts, which we say were justified by petitioner in the defense of his client, constitute contempt.

II.

A. We cannot accept respondent's argument that the record shows no basis for disqualifying the judge. Nor can we accept respondent's contention that this Court should read into the abortive findings of misconduct wilfullness and bad faith, because the judge in his certificate uses the language "insolent," "insulting" and "discourteous." Respondent argues that these words and the repeating of questions and the charging that petitioner tried to create an episode which might lead to a mistrial supply bad motives. This is pure argument. There are no find-

ings of deliberate and willful conduct taken in bad faith in the certificate (R. 25-28). This is a criminal proceeding. Deficiencies in the charge and findings cannot be supplied by argument. Moreover, as we pointed out in our Brief (pp. 27-28) the record shows that the judge here on numerous occasions specifically found that the conduct which resulted in his certificate was not done in bad faith and was not done intentionally by petitioner. (R. 68, 70, 73, 89, 153). As the judge below found that the acts of which he now complains were not intended to be insolent, sarcastic or otherwise disrespectful in the course of the trial, we say it is a little late to attempt to supply missing evil motives in respondent's Brief. The cases cited in footnote 13 of respondent's Brief in no sense meet the requirements which this Court laid down for adjudging attorneys guilty of contempt for violating court orders in *In re Watts and Sachs*, 190 U. S. 1, 32, 35.

Respondent (Br. 32) brushes off our contentions that the court below has found that the conduct of the trial judge showed hostility, bias and lack of impartiality (R. 280, 283-284) and says (Br. 33) that the judge's conduct demonstrated that the bias against petitioner was only a "strong dislike" for petitioner's conduct. As a further support for this argument, respondent states that there is no basis in the record for concluding that the judge had any bias or lack of impartiality towards petitioner's client. While we question the accuracy of this statement, because the court below reversed the conviction of petitioner's client, stating that the "chief factor" therefor was the misconduct of the judge (R. 267),[2] we will agree that all of the bias, lack of impartiality, hostility and personal dislike coming from the trial judge were directed at petitioner. Proceeding on respsondent's premise that the judge's hostility, bias and strong dislike only concerned

[2] The judge's comments on the return of the verdict show a prior belief in the guilt of the accused which is legal bias and disqualifying (R. 260).

petitioner, it is obvious that the judge is disqualified to act, because due process of law requires that a sentencing judge be free from any bias, hostility and lack of impartiality. This principle obviously is more applicable to a summary proceeding where no defense is allowed an accused and he is denied the right of counsel, because in such circumstances, the judge occupies the role of accuser, prosecutor and the trier of the facts. The degree of bias, hostility or lack of impartiality in summary proceedings is less than that which would be required to disqualify a judge who merely presides over a trial in which there is a defense and jurors are the ultimate triers of the facts. The danger inherent in bias in summary proceedings, which strikes at the roots of due process of law, is far greater than in ordinary trials.

Respondent argues (Br. 34) that we magnify the language of the *Peckham* and *Offutt* decisions and confuse the court's statement of the contentions below with the court's actual holding. We cannot accept this argument. It is true in the *Peckham* case the court below described the questions presented. (R. 281). Therefore respondent argues because the court below was divided over "the effect of these matters on the fundamental fairness of the trial" that we magnified the effect of the opinions below. We submit respondent is in error. The only division in the court concerned the effect "of these matters" on the trial and was whether or not they required a reversal. We submit the majority of the court felt that these matters and others required a reversal. (R. 281-282).

Nor can we accept the subsidiary argument of respondent (Br. 36-37) that petitioner provoked the judge and this is what caused the judge's judicial restraint to give way. While we agree that judge's restraint gave way, yet as respondent admits (Br. 37), it was petitioner who was provoked because the judge invaded counsel's area, excessively injected himself into the examination of witnesses and made numerous hostile comments to petitioner. And

the court below so held (R. 281). Even the dissenting judge in the *Peckham* case was of the opinion that extent of the judge's participation in the proceedings was not required by his obligation to maintain a firm and salutory control of the proceedings, that the judge invaded the area reserved for counsel and thus the judge *created* the conflict which engendered remarks and the attitude on the part of both the court and counsel which afflicted the trial (R. 282). The court below did not say, and the record does not substantiate respondent's argument, that petitioner's conduct created the disorderly atmosphere of the trial. Respondent, while forced to admit that the type of hostility shown by the judge occurred, seeks to evade the disqualifying nature of that hostility by attempting to compare it with the actions of the trial judge in *Dennis* v. *United States*, 341 U. S. 494 and *Sacher* v. *United States*, 343 U. S. 1. We say that neither of these cases answers our contention that hostility, bias and prejudice disqualifies a judge from entering a summary contempt judgment against an attorney. The Court of Appeals and this Court in the *Sacher* case held that the trial judge there did not show hostility, bias and lack of impartiality in sentencing the attorneys for contempt in that case. Whereas, here, the court below has found that the trial judge did display hostility, bias and a lack of impartiality. A reading of respondent's brief will show that bias and hostility were displayed by the trial judge and that it disqualified him from entering a summary judgment against an attorney against whom that hostility and bias were directed. *Tumey* v. *Ohio*, 273 U. S. 510.

We do not see how the argument (Br. 39-40) that the *Peckham* case was reversed because of the failure of the judge to admonish the jury that Peckham was not to be prejudiced because of any conduct of the trial judge can stand because the "chief factor" which led the court below to conclude that Peckham's conviction should be reversed was "the judge's treatment of petitioner" (R. 267).

A rather curious argument is made by the respondent (Br. 40-43), which is, because the judge on many occasions throughout the trial ruled in petitioner's favor, that this shows that the judge was completely fair and petitioner's conduct did not influence his judgment. We are unable to understand how the sustaining of valid objections of petitioner cures the prejudice resulting from the "excessive injection of the trial judge into the examination of witnesses, numerous comments to defense counsel, indicating at times hostility" which "demonstrated a bias and lack of impartiality" (R. 281).

B. We find nothing in the quote from *Sacher* v. *United States* (Br. 44) which answers our contention that the judge in a summary contempt proceeding must be neutral and must not be biased against an attorney. We think respondent admits (Br. 45) that when a judge's conduct shows that he acted "unreasonably" or "arbitrarily," that conduct "wholly incapacitated" him from acting judicially. Hence, respondent's argument (Br. 45) that the record does not show any bias on the part of the trial judge against petitioner is unsound and the court below has found to the contrary. (R. 280-281). In this connection, respondent cites *Fisher* v. *Pace*, 336 U. S. 155 (Br. 46). In the *Fisher* case, an adjudication of contempt was entered by a Texas court because of violations of certain rulings of the trial court occurring in open court. On appeal, the highest court of Texas affirmed but sharply divided. This Court divided five to four in affirming the contempt, the majority holding that the Texas court had power to punish certain contempts occurring in the face of the court under Texas law. Justices Douglas, Black, Murphy and Rutledge vigorously dissented. The dissent states that the summary contempt power should be exercised with delicate care otherwise it becomes an instrument of tyranny (p. 136), that freedom of speech in the courtroom deserves the same protection as freedom of speech outside the courtroom (p. 163), and that this Court should never permit a

lawyer to become the victim of the pique of a judge because if a judge intends to be unfair, the trial of the lawyer would be a farce (pp. 166-167). As the dissent shows (p. 169), *whatever the provocation* there can be no due process in a trial, summary or otherwise, "in the absence of calm judgment and action untinged with anger from the bench." We do not quarrel with the respondent's statement that the object of contempt proceedings is to assure order in the court and to prevent justice from falling into disrepute. We also agree that its great and only purpose is to secure the judicial authority from obstruction in the performance of its duties and that the minimum exercise of this power necessary for the preservation of public order is all that should ever be exercised in a given case. *In re Oliver*, 333 U. S. 257; *Ex parte Hudgings*, 249 U. S. 378; *Cooke* v. *United States*, 267 U. S. 517.

There has been no obstruction to the performance of judicial duty by petitioner here. On the contrary, petitioner was only exercising the legitimate functions of trial counsel as required of him by his oath as an attorney and the Sixth Amendment. If trial counsel are to be imprisoned summarily without a hearing by biased and prejudiced judges, the right of advocacy will have been dealt a death blow.

In answer to the general tenor of the respondent's arguments, we again state that the difficulties in the trial resulted from the judge's sensitivity to objections concerning his mannerisms and personal conduct, his excessive injection into the area reserved for counsel and his angry comments to petitioner. The first real flare-up came on June 4, 1952 (R. 81-82) when petitioner attempted to have the record show certain conduct of the judge occurring in the presence of the jury. The judge obviously became angry and threatened petitioner with jail if he persisted in making such objections. Carrying out the threat implicit in this warning, the judge treated this effort and every effort

of petitioner thereafter to have the record reflect the actions, personal mannerisms and conduct of the trial judge as a basis for fourteen contempt charges (R. 81-82, R. 313-314, R. 146, R. 154-155, R. 157-158, R. 177-179, R. 195-196, R. 209-210, R. 221-222, R. 228-229, R. 229-230, R. 172-173, R. 226-227, R. 215-216). The judge's findings of contempt are based upon the making of the objections, whether in open court or at the bench, and the objections themselves are treated as insolence and were so characterized. How are prejudicial mannerisms, gestures and movements of a judge to be shown? They do not appear in the record. How is an appellate court to evaluate these matters to insure a fair trial? Of course, the best means would be a motion picture, but we have none. Where a recording is not available, the last resort is a word description of the questioned conduct. Certain words evidence emotions. The record here shows gestures, expressions and judicial movements. Remarks coming from a judge like "stupid," "insolent", a charge of losing one's mind, and the like, are emotional and are accompanied by facial expressions and usually by gestures and bodily movements. Such words and such conduct can prejudice a case. As this Court knows, the place to win cases is in the trial court. If a lawyer feels his client's defense is being prejudiced by the conduct of a trial judge, he must act. When cut off or if he is cowed into inaction, an appellate court could rule in favor of a judge because of an inadequate record. The *Butler* and similar cases attempt to bring this forbidding situation to the attention of appellate courts for correction. An attorney should not be held in contempt for following these decisions nor should he be required to make objections at his peril. We do not think it is sound to argue that the making of such objections insult a trial judge and provoke him. If the judge does not agree with the factual statements contained in the objection or motion describing his mannerisms and conduct, he is free to place his

version in the record for appellate review. No objection made to the judge's conduct here was ever questioned factually by the judge or the prosecutor. When the instances of alleged contempt, which involve criticisms of the judge's conduct are read in context, and are considered in the light of the judge's conduct, we submit that petitioner's valid objections thereto were probably responsible for the other unfounded contempt citations in the certificate. Moreover, in the atmosphere of the trial, petitioner was obviously confused (Tr. 51, 72, 575, 751, 968, 1032, 1070, 1599), had difficulty hearing (Tr. 51, 72, 574, 575, 578, 764, 841, 968-969, 1007, 1032, 1099-1100, 1146, 1203, 1389, 1448, 1453, 1455, 1466, 1470, 1478) and was ill (Tr. 222, 327, 392, 398, 886, 1432, 1527). He certainly was confused by the inconsistent and contradictory rulings of the judge below and his threatening attitude, which we will paraphrase from the record:

> Yes, you may come to the bench. No, you may not come to the bench. Don't ask a question that violates my ruling. I will not answer questions on my rulings. Ask your questions. I don't rule in advance on questions. Don't you dare repeat questions. Make your proffer in open court. No, I will cut off all proffers. etc.

Certainly the confusion of petitioner in such a confused situation is understandable and is not contempt.

CONCLUSION.

We again submit that petitioner, trial counsel in the criminal case below, as best he could, only attempted to do his duty honestly and, as he understood that duty, to protect the rights of his client, the trial judge was disqualified to sentence petitioner, he is not guilty of the remaining

charges of contempt lodged against him and the unwarranted and summary judgment entered by that judge should be reversed.

Respectfully submitted,

WARREN E. MAGEE,
CHARLOTTE MASKEY,
Washington, D. C.
Attorneys for Petitioner.

Of Counsel:

MAGEE, BULOW & ANDERSEN,
Washington, D. C.